

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

INDUSTRIA DE ALIMENTOS ZENU, .  
et al., .  
Plaintiff, .  
VS. . Case No. 16-cv-06576  
LATIN FOOD U.S. CORPORATION, . Newark, New Jersey  
et al., . June 16, 2020  
Defendants. .  
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TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE MICHAEL A. HAMMER  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: PETER D. RAYMOND, ESQ.,  
Reed Smith LLP  
Floor 22  
599 Lexington Ave  
New York, NY 10022-7650  
(212) 521-5400

JEREMY A. BERMAN, ESQ.,  
Reed Smith LLP  
Floor 22  
599 Lexington Ave  
New York, NY 10022-7650

SAMUEL KADOSH, ESQ.,  
Reed Smith LLP  
Floor 22  
599 Lexington Ave  
New York, NY 10022-7650

Audio Operator:

Transcription Company: KING TRANSCRIPTION SERVICES  
3 South Corporate Drive  
Suite 203  
Riverdale, NJ 07457  
(973) 237-6080

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(APPEARANCES continued)

For the Defendants:	MARK J. INGBER, ESQ., Ingber Law Firm Suite 203 30 W Mount Pleasant Ave Livingston, NJ 07039-2931 (973) 921-0080
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1 (Commencement of proceedings)

2

3 THE COURT: Thank you. All right, we're on  
4 the record in Industria De Alimentos, et al. v. Latin  
5 Foods, et al. Civil Number 16-6576. Can I have  
6 appearances please beginning with Plaintiffs' counsel?

7 MR. RAYMOND: Peter Raymond from Reed Smith  
8 for plaintiff. Accompanying me are Sam Kadosh and  
9 Jeremy Berman also of Reed Smith.

10 THE COURT: All right, and for the defense.

11 MR. INGBER: Yes, Your Honor, for the  
12 defendants Latin Foods and Wilson Zuluaga, (phonetic)  
13 Mark Ingber.

14 THE COURT: All right, I will say at the  
15 outset counsel, I am -- I've consulted with Judge  
16 McNulty about what is going on in this case and we are  
17 very strongly inclined to appoint a special master to  
18 address the myriad discovery disputes. Including, but  
19 certainly -- certainly not limited to the hard drive  
20 issue and the potential issues that flow from that as  
21 well as various other ongoing discovery issues.

22 As the records will clearly reflect and counsel  
23 surely are well aware, I have refereed, resolved or  
24 presided over myriad discovery disputes in this matter  
25 going back to 2018, if not before then. And much like

1 Sisyphus, I suppose, every time that boulder gets  
2 pushed up the mountain it seems to roll back because  
3 new discovery disputes pop up.

4 The most current iteration of that is  
5 reflected in, among other filings:

6 Docket Entry 181 an 181 which are defendants'  
7 submissions regarding discovery issues.

8 Docket Entry 183, which his plaintiffs'  
9 letter.

10 Docket Entry 185, which is redundant with  
11 Docket Entry 186, which is a terminated motion to  
12 compel by the plaintiff, concerning the hard drive and  
13 defendants' sales figures for 2011 and 2013.

14 Docket Entry 187, which at least in terms of  
15 form is not redundant with Docket Entry 185 and 186,  
16 but for some reason plaintiff felt compelled to repeat  
17 a number of arguments regarding the discovery of the  
18 defendants' sales information.

19 Docket Entry 188, which is defendants'  
20 response to Docket Entries 185 and 187.

21 Docket Entry 193, which is plaintiffs' 2,355  
22 -- sorry 54 page submission -- that's not a  
23 misstatement concerning allegations that Wilson Zuluaga  
24 lied under oath and seeking to depose Mr. Ingber.

25 Docket Entry 194, which is plaintiffs' status

1 report filed only three days later, just in case the  
2 court managed to finish in that three days 2,354 page  
3 submission, and still needed more information about the  
4 plaintiffs' position.

5 And then, of course, the defendants' response  
6 to Docket Entry 193.

7 Those are the issues before the Court. I  
8 don't need to tell counsel in this case that this is  
9 certainly far from the only case before this Court.  
10 And there is, having consulted with Judge McNulty, real  
11 concerns about this Court's, with all of the other  
12 matters in front of it, ability to address these issues  
13 on an effective and timely basis.

14 Rule 53(a)(1)(C) authorizes the Court to  
15 appoint a special discovery master where the Court has  
16 concerns about whether the disputes before it can be  
17 effectively and timely addressed.

18 Of course I also have to consider the fairness  
19 of imposing the likely expenses on the parties and  
20 avoiding its unreasonable expense or delay. And of  
21 course, under Rule 53, afford the parties notice, which  
22 I'm doing now, and an opportunity to be heard. Of  
23 course under Rule 53 as well, the parties may offer  
24 suggestions for the special discovery master. The  
25 Court is not bound by those suggestions, but certainly

1 the parties can offer them, and the Court will consider  
2 them.

3           So, that is a very serious consideration by  
4 the Court. Like I said having discussed this matter in  
5 considerable detail with Judge McNulty. I don't know  
6 that -- obviously, the parties did not know that the  
7 Court was going to raise this today, so I don't want to  
8 put the parties in an unfair position as to today  
9 objecting or consenting or otherwise taking a position  
10 on the Court's consideration of appointing a special  
11 discovery master.

12           If anyone does wish to be heard now, I'm happy  
13 to hear you, otherwise what we will do is allow the  
14 parties to file a short -- short, by the way I feel in  
15 this case the need to maybe be a little more specific,  
16 would be a five page or less submission within a week  
17 from today as to each party's position on the  
18 appointment of the special discovery master.

19           Having said that, if plaintiff wishes to be  
20 heard at this point, I'd be happy to hear you.

21           MR. RAYMOND: Your Honor, just very briefly,  
22 we'll put in a letter. But I guess, my position is we  
23 don't -- I don't think we need this. I mean the only  
24 -- Your -- Your Honor has already ruled on most of the  
25 discovery issues. The -- you know, Your Honor ruled

1 that there has to be a production of documents from the  
2 hard drive which is being done by Mr. Ingber. Your  
3 Honor already ruled that we had the right to take Mr.  
4 Zuluaga's deposition after we get the hard drive  
5 report, which we plan to do.

6 We did, because of certain statements that Mr.  
7 Ingber made in letters that we believe are inconsistent  
8 with what his client testified to, we asked to do his  
9 deposition. But we would be prepared to waive that,  
10 certainly for now, and simply take Mr. Zuluaga's  
11 deposition and if he could clarify what the facts are  
12 then that would be sufficient for us.

13 So, we were just hoping to have the documents  
14 produced, do Mr. Zuluaga's deposition and then move on  
15 to the -- you know the motions that we thought the  
16 Court was going to schedule briefing on today.

17 So, we're not aware --

18 THE COURT: Which motions exactly?

19 MR. RAYMOND: -- of there being any other  
20 discovery disputes that Your Honor hasn't already ruled  
21 on. So --

22 THE COURT: What about the financial data, the  
23 sales numbers for 2011 to 2013?

24 MR. RAYMOND: Well, I believe that that was --  
25 that what there was was produced already.

1 THE COURT: So, the sales numbers are not  
2 still in dispute?

3 MR. RAYMOND: Sam and Jeremy could one of you  
4 respond to that? Didn't we get a response on that?  
5 the --

6 MR. BERMAN: Yes, this is Jeremy Berman --  
7 this is Jeremy Berman for the plaintiffs. Defendants  
8 did produce all of the sales documents that they have  
9 in their possession, so that has been resolved.

10 THE COURT: All right, well here -- I'm -- I  
11 have to say I'm rather surprised, because the plaintiff  
12 submission, Docket Entry 193, which was filed only a  
13 week ago makes some pretty serious allegations,  
14 obviously. And it goes into considerable detail as to  
15 the plaintiffs' theory of what happened. And I'm  
16 somewhat surprised to hear given that it's such a  
17 simple reductive position by the plaintiff today.

18 So --

19 MR. RAYMOND: Well, Your Honor --

20 THE COURT: -- because one of the real  
21 concerns -- hold on let me lay out my reaction first.

22 MR. RAYMOND: Yes, sir, go ahead.

23 THE COURT: One of the real concerns, among  
24 other things, is frankly that letter was one on the  
25 plaintiffs' theory and accusations. And other than



1 seeking Mr. Ingber's deposition, was pretty short on  
2 what remedy the plaintiff wanted.

3           Frankly, it left me scratching my head. I  
4 didn't know if you wanted still to make a spoliation  
5 motion. Although given that the hard drive actually is  
6 intact, I'm not sure what the basis for spoliation  
7 would be, I didn't know if it was a Rule 37 Sanctions  
8 motion. There's a reference that -- or a line in there  
9 that says, basically defendant shouldn't be able to  
10 drag all of this out at considerable delay and expense  
11 without consequences. Leaving me to wonder what those  
12 consequences were.

13           So, let me sum up. Exactly what does the  
14 plaintiff want then at this point?

15           MR. RAYMOND: Well, Your Honor, we simply want  
16 to make what we've said all -- all along is spoliation  
17 and sanctions motion, and a summary judgment motion.  
18 The only discovery we want, since they now discovered  
19 the hard drive, we want the documents on there, which  
20 Mr. Ingber has agreed to produce once he's gone through  
21 them and one a privilege review. And we need to depose  
22 Mr. Zuluaga since we've heard so many different stories  
23 about, you know what -- what happened with this hard  
24 drive and these documents and what we think are  
25 clearly, you know, had to be lies one time or another

1 in these two depositions. But that was all to be dealt  
2 with in our spoliation and sanctions motion.

3 We just need to get the documents on the hard  
4 drive, which we -- have been agreed to be produced.  
5 And we need Mr. Zuluaga's deposition. We could  
6 probably do it without Mr. Zuluaga's deposition because  
7 we've done it twice and we've taken his positions under  
8 oath. We just want to give him a chance to clarify, if  
9 he had any clarification for -- he made very clear in  
10 his first and second depositions there was one computer  
11 and one hard drive. And now Mr. Ingber has said in  
12 letters that there were multiple hard drives. But we  
13 think that's completely inconsistent with the facts  
14 that Mr. Zuluaga testified to. So, we wanted to try to  
15 clarify that in one final deposition.

16 But we're prepared, frankly, to go forward  
17 with the motions on the record we have, if that's a  
18 more efficient way to do it, because Mr. -- Mr.  
19 Zuluaga's had two separate opportunities under oath to  
20 explain what happened and we think that the hard drive  
21 that was discovered and the analysis of that hard drive  
22 from Pompeo (phonetic) clearly proves that Mr. Zuluaga,  
23 you know, told untruths under oath in both those  
24 depositions.

25 But we think -- you know, the evidence is

1 there to do that. We just thought we'd give him one  
2 more chance to try to explain it away. But other than  
3 that we're prepared to make our motions now.

4 THE COURT: And the motions again are for  
5 what? Putting aside summary judgment.

6 MR. RAYMOND: Well, spoliation and sanctions.  
7 We believe that --

8 THE COURT: Okay, what's the basis of the  
9 spoliation argument if the hard drives are intact and  
10 have been recovered?

11 MR. RAYMOND: Well, there's two possibilities.  
12 He -- he claims -- he said under oath that there was  
13 only one hard drive and it crashed, and that therefore  
14 he couldn't give us any documentation so we had to go  
15 spend hundreds of thousands of dollars in legal fees to  
16 try to recreate the record from third parties, which we  
17 did once we had -- or we largely did. Once we  
18 concluded that after two years, Mr. Zuluaga then said,  
19 oh well I discovered the hard drive.

20 THE COURT: Right.

21 MR. RAYMOND: And then -- and he's given us a  
22 bunch of documents from it. But now Mr. Ingber wrote  
23 to the Court and said, well that really wasn't the hard  
24 drive, that was some other hard drive, even though it  
25 has all the documents from the case on it and it goes

1 right up until a week before the alleged crash.

2           So, clearly I -- I -- I think we have been  
3 lied to repeatedly and that has cost our client  
4 literally hundreds of thousands of dollars in  
5 additional legal fees that shouldn't have -- they  
6 shouldn't have had to occurred, because Mr. Zuluaga  
7 should have pulled this hard drive out of his drawer  
8 two years ago and given us all these documents then.  
9 And then we wouldn't have had to go on this two-year --  
10 detour finding all the -- finding the documents from  
11 third-parties, which by the way are very hurtful to  
12 their case.

13           So, you know, I won't go in now to my personal  
14 view on this. But I -- you know, I -- I think we've  
15 been -- we've been lied to, repeatedly to try to hide  
16 -- hide the ball and hide the -- the very damaging  
17 evidence which we did manage to find.

18           So, I think there's some serious --

19           THE COURT: But what I just heard there though  
20 was a basis -- what I just heard was a basis for a  
21 sanctions motion. I still haven't heard a basis for a  
22 spoliation motion.

23           But either way why would the Court -- given  
24 the burden that the Court's under, why wouldn't --  
25 shouldn't the Court refer, even the spoliation and

1 sanctions issues to a special discovery or a special  
2 master to conduct any fact finding and any inquiry  
3 appropriate and make a recommendation about what the  
4 Court should do. That's going to involve a tremendous  
5 amount of time and effort. And it's going to be a  
6 major commitment for the Court.

7 Not to mention --

8 MR. RAYMOND: Well --

9 THE COURT: Hold on just to complete the  
10 though.

11 MR. RAYMOND: Yeah.

12 THE COURT: Not to mention, I would predict  
13 with near metaphysical certitude, that there are going  
14 to be disputes about the production of the documents.  
15 Pompeo identified almost 9,000 document hits and a  
16 total of almost 11,000 -- or 11,427 documents that  
17 touched upon court ordered search terms. They've been  
18 turned over to Mr. Ingber who is going to review the  
19 data and provide the documents to plaintiff, with a log  
20 identifying any documents defendants are withholding  
21 and the basis for withholding such as relevance and  
22 privilege within two weeks of completion.

23 I would -- I would predict, like I said, with  
24 near complete confidence, that is absolutely engender  
25 further disputes, be they privilege, be they relevant.

1 Why shouldn't the Court -- in the context of the -- and  
2 look, let's be clear. I've read the letter. I'm not  
3 going to sit here and tell you I've read all of the  
4 exhibits, but I've read the letter. To describe the  
5 tone in that as vituperative would not be an  
6 overstatement. There are going to be disputes.

7 In light of the looming sanctions motion,  
8 still not quite sure I get the spoliation motion, but  
9 -- but I'll allow that perhaps there's some theory  
10 under Rule 37 that I haven't thought of that plaintiff  
11 did. Why should the Court not appoint a special  
12 master?

13 MR. RAYMOND: Well, Your Honor, I guess my  
14 thought is just that it isn't necessary. We could make  
15 the motion -- you know we think the facts are there,  
16 that they've been developed in the several years of  
17 litigation, --

18 THE COURT: I'm sure you do.

19 MR. RAYMOND: -- it's been very hard to get  
20 it, but --

21 THE COURT: I'm sure you do. And having read  
22 Mr. Ingber's letter I'm sure he does not agree. So,  
23 the Court may have to have hearings --

24 MR. RAYMOND: Yeah, I mean Mr. Ingber's letter  
25 -

1 THE COURT: I'm sorry?

2 MR. RAYMOND: I was just going to say, Mr.  
3 Ingber's letter doesn't respond to the most -- the most  
4 significant allegations in our letter, which is that  
5 Mr. Zuluaga just simply lied at his deposition. He  
6 doesn't really deal with those issues at all by saying  
7 there's some second hard -- some other hard drive.

8 I mean Mr. Zuluaga in both deposition, as  
9 recently as last December, testified that there was one  
10 hard drive and it crashed. We now learned from Mr.  
11 Ingber's letter that in fact prior to that deposition  
12 Mr. Zuluaga had found the hard drive and had brought it  
13 to the Best Buy. So, I mean -- but all those facts are  
14 out there now.

15 So, you know, we're -- we're prepared to make  
16 the motions. I mean we don't even really need the  
17 depositions any more. We would like to see the  
18 documents that are going to be -- and I -- I -- I --  
19 -- you know, I can't tell you that the won't be any  
20 dispute over the documents and the privilege log,  
21 because we haven't seen them yet.

22 But -- but since we already have from all of  
23 the discovery, we had to take from third parties we  
24 already have some pretty damning evidence about all  
25 this. You know we're -- we're prepared to make our

1 motion. So, --

2 THE COURT: So the Court -- but the Court can  
3 appoint a special master even to consider the motions.

4 MR. RAYMOND: No, I understand that Your  
5 Honor.

6 THE COURT: Under Rule 53 --

7 MR. RAYMOND: We're not arguing with the  
8 Court's right to do it. I'm just -- I'm just  
9 questioning whether it's really necessary at this  
10 point. But obviously that's not my position. So --

11 THE COURT: Let me hear from Mr. Ingber.  
12 Because I have a 1 o'clock conference that I absolutely  
13 cannot be last for.

14 Mr. Ingber what's your position if you wish to  
15 be heard today.

16 MR. INGBER: Yes, Your Honor, this is Mark  
17 Ingber. You know, frankly Your Honor I'm as astonished  
18 as you are. They make -- they make the most -- the --  
19 the most serious of allegations in this June 9th  
20 letter. And now they're just willing to withdraw  
21 everything. You know, make believe it never happened  
22 before and just move forward with -- with --

23 THE COURT: Well, no -- no -- no -- no --  
24 they're not -- to be clear, they're not proposing to  
25 withdraw it. Maybe at least as to taking your



1 deposition they are. They're proposing, instead, to  
2 basically bring it in the form of a motion. Which is,  
3 to be clear, is their right to do without making any  
4 prediction, as to the merits or not of the motion, it's  
5 their right to bring the motion. But to be clear. The  
6 dispute is not going away.

7 MR. INGBER: Your Honor, I don't know --  
8 again, making accusations against an attorney and then  
9 just dropping it is a very serious thing. You know  
10 where do I regain my reputation, Your Honor, you know  
11 in -- in this situation. There's been all these  
12 horrific allegations referenced against me. And now  
13 they don't need to take my deposition. Now they don't  
14 need to take my client's deposition Your Honor. Now,  
15 they're just ready to move forward on some -- on their  
16 continuous spoliation and -- and now sanctions I'm  
17 hearing for the first time Your Honor.

18 They haven't named an expert yet. You've been  
19 asking them. It's been four years and we still don't  
20 even know if they're going to name an expert witness,  
21 Your Honor.

22 There's all these things that they just throw  
23 out there, they just make these accusations. Clearly,  
24 Your Honor, we disagree with everything that they said.  
25 And I just see this -- I just see this -- like you said

1 Your Honor, there's no chance in the world that we're  
2 not going to have an issue was to the documents that  
3 we're withholding. And then you'll receive another  
4 letter from plaintiffs' counsel informing the Court.  
5 This is just going to go on and on forever Your Honor.

6 They seem to be in a rush to move forward, but  
7 they keep raising new issues Your Honor. So, I don't  
8 -- I mean to me a master, you know, maybe that would  
9 help alleviate all -- all their anger and everything  
10 that they feel in this case, so that we can move  
11 forward.

12 THE COURT: All right listen here's what I'll  
13 do. Go ahead if plaintiffs briefly respond --

14 MR. RAYMOND: All I want to say Your Honor is  
15 we've been trying to make this spoliation motion for  
16 two years. So, the last thing in the world we want is  
17 further delay. And that's really why we're opposed to  
18 a special master. We want to -- we want to get this  
19 case to conclusion. That's all we've been trying -- if  
20 you recall we wanted to make this spoliation motion  
21 before discover even.

22 So, we haven't delayed this. All -- you know,  
23 we were ready to go, and then all of a sudden Mr.  
24 Zuluaga says, oh look at this I found the hard drive,  
25 after it was all done, we were all ready to go

1 forward.

2           So, we didn't raise this. We then had to get,  
3 you know, an expert to look at the hard drive, who  
4 found that it never crashed, and it was always  
5 available. So, you know games have been -- I mean  
6 games is a nice word here. I mean terrible things --

7           THE COURT: All right. I got it. I got it.  
8 I got it.

9           MR. INGBER: Your Honor one final comment?

10          THE COURT: No -- no listen this is not  
11 productive. Let me make the following observations.

12          Plaintiff I think is incorrect in the premise  
13 that by appointing a special master it's going to cause  
14 undue delay. Given the scope of the disputes here, the  
15 very like -- the very strong likelihood of additional  
16 discovery disputes, I respectfully disagree. Not  
17 appointing a special master is -- my concern is going  
18 to cause dispute. Because the Court -- again, this is  
19 not the Court's only matter and the disputes here are  
20 significant, they very well could require additional  
21 fact finding.

22          But in any event, because I wanted to give the  
23 parties a fair opportunity to be heard. I light of the  
24 fact that the parties have put their positions on, does  
25 either party still wish to submit a written

1 submission?

2 MR. RAYMOND: Oh, Your Honor, plaintiff would  
3 like to submit -- would like to make a written  
4 submission on this issue, if the Court --

5 THE COURT: That's fine. All right, so I'll  
6 allow both sides to make any submission limited to five  
7 pages, double spaced, by the 23rd, okay.

8 MR. RAYMOND: Very good Your Honor, we will do  
9 that.

10 THE COURT: Thank you counsel, we're  
11 adjourned.

12 MR. INGBER: Your Honor?

13 THE COURT: Yes?

14 MR. INGBER: Just one point again. What about  
15 the expert witness, Your Honor?

16 MR. RAYMOND: Your Honor, we don't intend --  
17 plaintiff does not intend to call an expert witness on  
18 liability issue.

19 THE COURT: What about damages?

20 MR. RAYMOND: Well, we wanted to move for  
21 summary judgment on liability. So, that -- that was  
22 our intention. So we, I think -- I thought that we  
23 agreed previously that we would hold off on damages  
24 until after liability was determined. But -- so I  
25 don't know if we wanted a damages expert or not at this

1 point. But we do not intend to call any liability  
2 expert. And I believe defendant said the same thing.  
3 So --

4 THE COURT: Uh huh.

5 MR. INGBER: Again, Your Honor --

6 (Indiscernible conversation)

7 THE COURT: What?

8 MR. INGBER: Your Honor?

9 THE COURT: Yeah.

10 MR. INGBER: I mean it's -- it's nice to hear  
11 on the record that -- that they finally agree not to --  
12 not to name a -- a liability expert. You know, but  
13 Your Honor frankly -- you know, it's your call as to  
14 any damage expert. It's now -- don't you think now is  
15 the appropriate time for them to get off the pot and  
16 say whether they're going to name one or not, instead  
17 of you know having their cake and eat it too, waiting  
18 until a decision on a summary judgment motion?

19 We're going to bring our own summary judgment  
20 motion by the way.

21 THE COURT: Fair enough. I'm going to take  
22 that advisement because I really have to get to my 1  
23 o'clock counsel. I look forward to your letters by  
24 next week if you still want to submit them. All right,  
25 thank you.

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MR. RAYMOND: Thank you Your Honor.

(Conclusion of proceedings)

1  
2  
3 I, JESSICA ROBINSON, Transcriptionist, do hereby  
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13 I further certify that I am in no way related to  
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17  
18 /s/Jessica Robinson  
19 Signature of Approved Transcriber

06/18/20  
Date

20  
21 Jessica Robinson, AOC #581  
22  
23 King Transcription Services  
24 3 South Corporate Drive  
25 Suite 203  
26 Riverdale, NJ 07457  
27 (973) 237-6080  
28  
29  
30